2016 Employment Law Update

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What’s New?
U.S. Unemployment Continues To Decline!
From December 2013 – December 2014, all 50 states experienced job growth:

# 1: North Dakota
# 50: Mississippi

(Note: during the great recession, only 2 states were up)
Meanwhile, Back at City Hall …

- The Municipalization Of Labor And Employment Law!
- Almost every day in the U.S., a new labor/employment law is born!
But Can All These Laws Be Enforced?

Enforcement by Government Agents!
Federal Investigations and Audits: MSHA, OSHA and WHD

**Time Period:** October 8, 2015 – November 7, 2015
Enforcement by Employees

- “Private Attorney Generals” are out there, and are multiplying!
- PAGA claims are easier to bring than are class actions!
What Does It All Mean?

1. The field of labor and employment law continues to grow and stratify and become more complex.
2. The stakes in employment and labor law continue to get higher.
3. Keeping informed and up to date is more important now than ever!
4. The HR function is more important now than ever before in the past!
That’s Why We Are Here!
Disclaimers!

- We will go fast!
- We won’t cover everything!
- This training does not substitute for the advice of counsel!
1. Exempt From Overtime?
2. Pay Stub Checklist
3. Fair Pay Act
4. Piece Rate Pay
5. Sick Leave “Clean Up”
6. Race Discrimination
7. Disability Discrimination
8. Retaliation
9. Restrooms and Transgender Workers
10. Cheerleaders!
Wage and Hour: “The Oldest Law On The Books!”

Leviticus 19:13: “Do not hold back the wages of a hired man overnight.”
At least the FLSA is a bit more modern…

1938!
New Wrinkles On Old Laws

1. Overtime Exemptions: The Compensation Test
2. Pay Stub Self-Correction
3. Dramatic Expansion of Fair Pay Act
4. Piece Rate Worker Pay
THE “THREE Qs TEST!”
1. How Do You Determine Who Is Exempt?
The Three Qs

1. Does the employee do work of an exempt quality?
2. Does the employee perform a sufficient quantity of such work?
3. Does the employee receive the quompensation required to be exempt?
Actually 2 Qs and One C

1. Does the employee do **work of an exempt quality**?
2. Does the employee perform a sufficient **quantity** of such work?
3. Does the employee receive the **compensation** required to be exempt?
Who is Exempt?

1. Executive
2. Administrative
3. Learned, Artistic and Computer Professionals
4. Outside Sales
5. Commission Sales
D.O.L. Overtime Regulations

- Remember the third “Q”?  
- U.S. Dep’t of Labor has issued a regulation
  - Currently, $455/week or $23,660/year
  - (Note: California minimum was $37,440 last year, now is $41,600)
  - Federal minimum expected to increase to $970/week or $50,400/year by the time a Final Rule is issued in 2016
D.O.L. Overtime Regulations

- D.O.L. regulation was scheduled for 1-1-16
- Now, delayed, likely until late 2016
  (after the Presidential election)
Practical Suggestion

- **Impact**: Large numbers of formerly exempt employees will no longer be exempt
- Audit your exempt employees!
### Pay Stub Self-Correction

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**Total Earnings**

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**Year to Date**

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<tr>
<td>Taxable Gross</td>
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<td>Non-Taxable Gross</td>
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What Is a Wage Statement?

- A detachable part of a paycheck that provides required information about employee’s wages
  - Labor Code § 226 prescribes the required information
The 9 Requirements

1. Gross wages earned

2. Total hours worked
   a) Except salaried exempt employees
   b) Cannot “estimate” OT or other additional hours

3. Number of piece-rate units earned and the applicable piece rate
   a) Must separately pay non-productive work hours

4. All deductions
The 9 Requirements

5. Net wages earned
6. Inclusive dates of the pay period
7. Name of employee and only last 4 digits of SSN or employee ID number
8. Name and address of legal entity that is the employer
9. All applicable hourly rates in effect during pay period and corresponding number of hours worked at each hourly rate
Impact of New Paid Sick Leave Law

- Effectively, the 10th wage statement requirement
- Must include amount of paid sick leave (or PTO) available on employee’s wage statement or in separate notice - Labor Code § 246(h)
BEWARE

DO NOT rely solely on your payroll service to comply with § 226
AB 1506 allows employers 33 days from LWDA notice to cure violations of 2 of wage statement requirements:

- Name and address of legal entity that is employer
- Inclusive dates of pay period
- **Effective Today** (As of Oct. 2, 2015)
When employer receives letter from employee or lawyer to LWDA alleging violation, employer has 33 days to provide fully compliant statements to each employee for each pay period for prior 3 years

- Short time to cure
- Long correction period

If cured, no PAGA claim
Cure Is Not a Panacea

- Ability to cure is not unlimited: Employer can exercise this right once within 12-month period
Cure Is Not a Panacea

- An Employer who “cures” may be providing evidence of wrongdoing.
- Employee still can sue (class action) for statutory penalties under Labor Code § 226(e)
3. Dramatic Expansion of Fair Pay Act
California Fair Pay Act

- **Former test**: employee is not being paid the same as someone of the opposite gender at the “same establishment” for “equal work”
- **New test**: employee is not being paid the same as someone of the opposite gender at the “same employer” for “substantially similar work”
Equal Pay

- Not just base wage, but entire compensation package:
  - Salary
  - Bonus
  - Commission
  - Benefits
  - Etc.
Employer’s Affirmative Defense

- Pay Differential May Lawfully Be Based on:
  1. Seniority
  2. Merit
  3. Quantity/Quality of Production
  4. Bona Fide Factor Other than Sex

- But, Employer Must Explain Entire Wage Differential
Increased Employer Burdens

- Employees may now have a right to ask about other employees’ pay and benefits
- Extended record retention requirements
Practical Suggestions

- Get help!
- Audit pay practices to identify potential gender-based differences
- Evaluate record retention policy
- Correct as necessary
When You Have Bad News to Deliver…

- HR and Operations must work together
- Be honest about the risks of misclassification (exempt – contractors) and weigh those risks fairly
4. Piece Rate Worker Pay
Basic Wage-Hour Obligations

- Pay the minimum wage for all hours worked
- Provide a 10 minute **paid** rest period for every 4 hours worked
Piece-Rate Issues

- But what about piece-rate workers?
- How do we know if we are paying minimum wage for all work time, including paid rest periods and other “nonproductive” time?
Federal Law – Piece-Rate Averaging Is OK

- Federal law permits “piece-rate averaging”
- Take total piece rate earnings, divided by number of hours worked. If that equals or exceeds the federal minimum wage, you are ok.
Federal Law –
Piece-Rate Averaging Is OK

- If total piece rate earnings, divided by number of hours worked does NOT equal minimum wage, pay a supplement to make up the difference so all hours are paid at the minimum wage.
Piece-rate averaging is **not** allowed in California.

California law does not permit wages paid above the minimum wage for “productive work” to be used as a credit toward minimum wage obligations for “non-productive” work.

“The minimum wage standard affixes to each hour worked...”

An employer in California must pay, in addition to piece-rate earnings, separate wages at an hourly rate of no less than the minimum wage for the employee’s non-productive work time. (This would include rest periods)

The Result: Class Actions!

- Failure to pay minimum wage for breaks!
- Failure to pay minimum wage for non-productive time!
The Solution?

- AB 1513
- New Labor Code section 226.2, effective 1/1/16
- Applies to all CA employees paid on piece rate system
The Solution?

- Employees must be separately compensated for rest and recovery periods – at least min. wage
- Employees must be separately compensated for “other nonproductive time” which is “time under the employer’s control, exclusive of rest and recovery periods, that is not directly related to the activity being compensated on a piece-rate basis”
California Labor Code 226.2

- Amount of nonproduction time paid must be based on actual time records, or “reasonable estimate” by employer
- Must be compensated – at least the minimum wage
Wage Statement Requirements:
+ total hours of compensable rest and recovery periods, rate of pay, gross wages during pay period
+ total hours for other nonproduction time, rate of pay, and total gross wages for pay period
Affirmative defense to liability if ALL of the following factors met by 12/15/16:

- Employer makes payments to all current/former employees for the amount of break and nonproductive time not already compensated
  - Use actual amount of wages due; OR
  - 4% of gross earnings during relevant period

- Make good faith effort to locate all current/former employees

- Provide written notice to D.I.R. by 7/1/16
Practical Suggestions – Piece Rate Compensation

- Audit now!
- Get help!
- Consider changing your compensation plan
Minimum Wage + Piece Rate Bonus

- One option – pay minimum wage for all hours worked, plus a productivity bonus.
- However, under AB 1513, you must pay the “regular rate” for rest and recovery periods.
- “Regular rate” is the average of minimum wage plus productivity bonus received.
Minimum Wage + Piece Rate Bonus

- Downside: The average of minimum wage plus productivity bonus received may fluctuate from week to week, requiring recalculation.

- So, consider calculating the maximum regular rate which could be earned, and use that every week as the rate for rest and recovery periods.
5. California Mandatory Sick Leave – “Cleaned Up?”
Remember the Basic Framework

1. Accrual
2. Use
3. Carryover
Employee must work for the same employer for 30 or more days within a year of the start of employment to be eligible to use sick leave time.

Alternative accrual methods allowed: set amount per pay period or per quarter, provided that the employee accrues no less than 24 hours of paid sick time by the 120th calendar day of the year.
Sick Leave Amendments – AB 304

- Allow employers with unlimited or undefined leave banks to indicate “unlimited” on the employee’s itemized wage statement.
6. Race Discrimination Update
Race Discrimination?

- **2009**: African-American male job applicant applies for a vacant job. He is not hired, the job is instead given to a white male.

- **2010**: Same applicant applies again, for another vacancy in the same job classification. Again, he is not hired, the job is instead given to a white male.
Later in 2010, he files a claim for race discrimination in violation of the California Fair Employment and Housing Act.

In 2011, during the “discovery” phase of litigation, the applicant admits that he had been convicted of possession of narcotics for sale in April 1997.
Race Discrimination?

- Employer: “At the time we didn’t give him the jobs, we didn’t know that!”
- “This conviction makes him unqualified for the job!”
The Question …

- Which job can you NOT do if you have been convicted of possession of narcotics for sale?
The Answer…

Union Organizer!
Union Organizer Jobs!

- The Employer here was the Painters’ Union
- Federal law says this applicant can’t have the job: Section 504(a) of the LMRDA of 1959:
  “No person...who has been convicted of ... a violation of narcotics laws ... shall serve ... as an ... organizer ... of any labor organization...”
The Union’s Position

- He never was qualified for the job, therefore he can’t sue for race discrimination!
The Conclusion

- He can still sue for race discrimination!
- “After-acquired evidence” is not a complete bar to a discrimination claim, but does limit the remedies available.
- Remedies for discrimination are still available from the time of the discrimination up to the point in time when the employer acquired the evidence.
A Taste Of Their Own Medicine!

- Lost wages from 2009 (the first time he didn’t get the job) until 2011, when the Union discovered the conviction.
- Case may proceed to trial.

Horne v. Dist. Council Painters etc.
(Cal. Ct. App. 2015)
Lessons Learned

- Audit your pre-employment processes!
- If criminal conviction (or something else) bars employment, be sure to ask all job applicants about that during the job interview!
- Unions are employers too!
7. Disability Discrimination Update
Disability – Accommodation

- Employee suffers from ulcerative colitis, causing lack of sleep.
- Employee is transferred to several different jobs, and is provided an accommodation: report to work at 9:00 a.m. (rather than 6:00 a.m.)
Employee is eventually terminated for violation of leave policies and job abandonment

Employee files claim for disability discrimination
Employee’s Written Declaration

- Employee alleges that a supervisor stated: “If you are going to stick with being sick, it’s not helping your situation... You’re not getting paid, and you’re not going to be accommodated.”

- Employee also alleges that supervisor said “I’m done with that guy.”
Intentional Discrimination?

- Trial Court: The Employee’s declaration is self-serving, and doesn’t amount to evidence of discriminatory intent.
- There isn’t enough here for the case to go to a jury!

_Nigro v. Sears, Roebuck and Co.,_ D.C. S.D. Cal. (Nov. 28, 2012)
Reversed On Appeal!

- 9th Circuit: “Declarations are often self-serving!”
- “…it should not take much for [a] plaintiff in a discrimination case to overcome a summary judgment motion.”
- The case may proceed to trial.

Nigro v. Sears, Roebuck & Co.,
(9th Cir. 2015)
Lessons Learned

- Train supervisors to speak carefully.
- Carefully document all conversations about accommodations and the interactive process.
- Self-serving “evidence” offered by a Plaintiff may be enough to get a case to the jury.
Does Threatening To Shoot Your Supervisor Make You Unqualified To Do Your Job?
A Welder Is Depressed

- Welder of aircraft parts is diagnosed with “Major Depressive Disorder.”
- With medication and treatment, he works without significant incident for 11 + years.
New Supervisor

- A new supervisor is assigned.
- Employees complain that the new supervisor is bullying them and making their lives miserable.
- Meeting held with HR to discuss concerns.
The Welder’s Response

- Shortly thereafter, employee tells a co-worker:
  
  “I feel like coming down with a shotgun and blowing his head off.”

  “But don’t worry, because you won’t be working the shift when the killing would occur.”
More Statements

- He tells another co-worker, on several occasions:
  
  "I plan to come on day shift to take out management."

- Tells a third employee:
  
  "I want to bring a gun down and start shooting people."
“All I would have to do to shoot the supervisor is to show up at the Company at 1:30 in the afternoon because that’s when all the supervisors have their walk-through.”
The Investigation

- Co-workers eventually report to HR
- During investigation, employee is asked: “do you plan to carry out your threats?
- Employee replies: “I can’t guarantee I wouldn’t do that.”
The Investigation

- Employee is suspended and barred from Company property.
- The police are informed.
Knock and Talk

- That evening, the police visit the employee at his home.
- Employee admits to making the threats, and admits that he has several guns at home.
Knock and Talk

- Officer: “Do you plan to go to the Company and start shooting people?”

- Employee: “Not tonight.”
The Problem is “Municipalized.”

- Officer: “Perhaps you should check into the psychiatric hospital and get some help.”
- Employee: “Ok.”
Next Up: FMLA!

- Employee remains hospitalized for seven days
- Employee goes home, asks for and is granted FMLA.
Accommodation?

- Eventually he is cleared to work by a treating psychiatrist, who states “he is not a violent person.”
- Psychiatrist recommends a new supervisor be assigned.
No, Thanks

- Employee is terminated.
- Brings an ADA claim.
- His “disturbing statements and comments” were the symptoms of and were caused by his disability.
The Ruling

- We assume the employee has a disability
- But, the employee is not a “qualified individual with a disability.”

*Mayo v. PCC Structural, Inc.* 795 F.3d 941 (9th Cir. 2015)
The Ruling

- He cannot perform essential functions of the job
- “An essential function of almost every job is the ability to appropriately handle stress and interact with others.”
The Ruling

- “An employee is not qualified when workplace stress leads him to threaten to kill his co-workers in chilling detail and on multiple occasions (here, at least five times).”
The Ruling

- It is not a reasonable accommodation to require assignment to a different supervisor.
Lessons Learned

- The topic of workplace violence involves far more than the duty to provide a safe workplace:
  - The legal “rights of the perpetrator” must also be considered
Lessons Learned

- The broad wording of the ADA allows for creative lawyering
Lessons Learned

▪ Don’t take this too far: a disabled employee who is gruff, rude, abrupt and uses profanity may well be a “qualified individual with a disability.”
Lessons Learned

- Employer’s response to threats of violence was methodical and effective
- Employee: “I’m going to shoot my boss.”
- HR: “Well, how about you go on FMLA for a while!”
Lessons Learned

- One significant concern here: delay in reporting by employees.
- Suggestion: training
“Mental illness is a serious problem that affects millions of Americans, including many lawyers and judges.”
8. Retaliation
More Ways To Sue For Retaliation

- **Prior law:** employer can’t retaliate against an employee who has filed a claim for wages due or participated in a Labor Commissioner proceeding

- **New law:** employer can’t retaliate against an employee who is a family member of a person who has filed a claim for wages due or participated in a Labor Commissioner proceeding

AB 1509
Family Member Retaliation

- **Example:** Husband and Wife both work for the XYZ Company. Husband is terminated, files a Labor Commissioner claim for unpaid overtime and unpaid vacation.
- Employer then changes work assignment of Wife.
- Wife has a claim for retaliation under Labor Code § 1102.5(h).
More Ways To Sue For Retaliation

- **Current law:** Employers must provide reasonable accommodation based on disability and religion
- **New law:** Employers may not discriminate or retaliate against employees who make a request for reasonable accommodation, regardless of whether or not the request was granted

AB 987
9. Restrooms and Transgender Workers
Restrooms and Transgender Workers

OSHA has released “A Guide to Restroom Access for Transgender Workers” (June 2015)
Transgender Restroom Access
Per OSHA Guide

- Guide provides “model practices,” including:
  - Allowing employees to use facilities that correspond with their gender identity
  - Allowing employees to determine for themselves the most appropriate and safest restroom to use
Transgender Restroom Access
Per OSHA Guide

- Guide provides “model practices,” including:
  - Prohibiting employers from requiring transgender employee to use facility separate from other employees
  - Prohibiting employers from requiring medical/legal documentation to gain access to restroom facilities
Suggestions

- OSHA guidelines are just that.
- However, transgender workers are protected by state law.
- Following the guidelines can provide assistance in the event of a discrimination claim.
10. Cheerleaders!
Cheerleaders Are Employees, Too!

- A cheerleader utilized by a California sports team is an “employee” for purposes of:
  - The labor code
  - The unemployment insurance code
  - FEHA

- “Cheerleader” defined as an individual who performs acrobatics, dance, or gymnastic exercises on a recurring basis for a professional sports team.
Cheerleaders Are Employees, Too!

- Professional sports teams include major and minor leave baseball basketball, football, ice hockey and soccer.
- Does not include individuals utilized no more than one time in a calendar year.

AB 202
Cheerleading Is A High School Sport!

- AB 949: “Cheer athletes” will now have their own CIF sanctioned sport!
- Go, team!
Questions?
THANK YOU

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